United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

SIGNED ORIGINAL
with proof of service

76-7410

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 76-7410

B

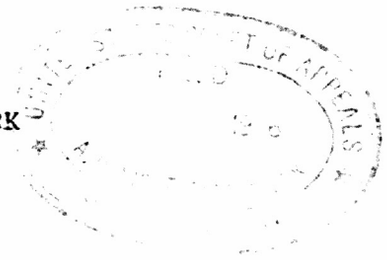
P/S

AMERICAN GREETINGS CORPORATION,
Appellant,

v.

WESTRANSCO FREIGHT COMPANY, INC.
and
ASSOCIATED FREIGHT LINES, INC.
Appellees.

ON APPEAL FROM A JUDGMENT OF
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



APPELLANT'S INITIAL BRIEF

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APPELLANT'S INITIAL BRIEF

Statement of Issues Presented.

When a formal notice by a shipper to a common carrier of a claim could not accomplish anything, because the carrier was fully aware (and itself had acknowledged such awareness in writing to the shipper) of all the facts concerning the wreck of the carrier's vehicle and the consequent destruction of the shipment involved, may the carrier use a requirement in the bill of lading for such formal notice to shield itself from liability for its negligent destruction of the shipper's property?

Statement of the Case.

This is an action by AMERICAN GREETINGS CORPORATION ("American Greetings"), plaintiff-appellant, against WESTRANSCO FREIGHT COMPANY, INC. ("Westransco"), a freight forwarder licensed by the Interstate Commerce Commission, to recover for loss of freight tendered to it on March 14, 1974 by American Greetings for transportation in interstate commerce and never delivered. (R.A., pp. 45-46). Westransco has filed a third-party complaint against ASSOCIATED FREIGHT LINES, INC. ("Associated") seeking indemnity. Associated was the motor carrier in whose possession the property was destroyed in a truck accident. The circumstances of this accident are set forth in Westransco's answer to plaintiff's initial interrogatories (R.A., p. 46):

> "Otha Jones, driver for Associated Freight Lines, was involved in an accident at 8:05 p.m. on March 27, 1974, on the Oakland side of the San Francisco-Oakland Bay Bridge. Heavy rain was falling at the time. Most of the shipments were thrown out of the vehicle at impact and scattered on the floor of the bridge. In an effort to clear the bridge for traffic, the bridge authorities dispatched skip loaders and dump trucks to the scene of the accident. The skip loaders scooped up the shipments and deposited them in the dump trucks. The trucks then dumped the shipments in an open area near the toll gates. Rain continued to fall and by that time it was almost impossible to identify any of the shipments."

Westransco sent a letter on April 19, 1974 to the consignee of each of the five shipments at issue advising that the

shipments were involved in an accident and considered a total loss. Copies of the carrier billing documentation were enclosed by Westransco "to assist you in filing claim." (R.A., pp. 47, 54). Westransco mailed copies of each of these letters to American Greetings (Ibid.) but American Greetings has no record of receiving them. (R.A., p. 59).

American Greetings inquired about two shipments on January 23, 1975 in letters to Westransco's agent containing the essential elements of a claim. (R.A., pp. 26, 59, 88). On February 10, 1975 Westransco sent a letter to its agent describing the damage to these two shipments and concluding: "Please inform American Greeting Corp. so that they might go ahead and file claim." (R.A.,p.59) In April, 1975 American Greetings finally learned about the losses, and filed five claims on May 30, 1975. (R.A., pp. 26, 32-41).

In answer to interrogatories, Associated stated that while some goods in the truck were salvaged for $1500, those shipped by American Greetings were completely destroyed. (R.A., p. 74). However, according to Westransco, by the time the truck's cargo was removed from the bridge, "...it was almost impossible to identify any of the shipments." (R.A., p. 46).

This case was decided on cross motions for summary judgment by American Greetings and Westransco. Westransco acknowledged issuing bills of lading for the five shipments which

recited that they were received "in apparent good order." (R.A., pp. 45, 49-53). Westransco further acknowledged that the goods were never delivered and were completely destroyed. (R.A., p. 46). American Greetings presented evidence that the full actual loss, damage and injury resulting from the failure to deliver the five shipments totaled $11,528.45; however because of a released rate agreement approved by the Interstate Commerce Commission and signed by the shipper, the claim was reduced to $10,208.88 (R.A., pp. 58-59). Neither Westransco nor Associated has disputed the accuracy of these amounts.

The court below granted summary judgment to Westransco (R.A., pp. 87-91) and dismissed the third-party complaint as moot (R.A., p. 69). With the consent of Westransco, the court ordered it to refund $382.59 of freight charges paid by American Greetings (R.A., p. 90). The court below ruled that timely filing of a written claim is a condition precedent to recovery for loss or damage, and that strict adherence to the terms of the bill of lading is necessary to prevent discrimination. On appeal, American Greetings contends that the court below erred in refusing to follow the only case precisely on point, Hopper Paper Co. v. Baltimore & Ohio R.R. Co., 178 F. 2d 179 (7 Cir., 1949) cert. denied, 339 U.S. 943 (1950); and that no unlawful discrimination would result by allowing American Greetings to recover in this action.

ARGUMENT

I The claim filing requirement must be given a practical and liberal interpretation.

The court below erred by ruling that "strict adherence" to the claim filing requirement in the bill of lading is required. (R.A., p. 89). This court has recently decided that the Carmack Amendment to the Interstate Commerce Act (49 U.S.C. §20(11)) is "a remedial statute." AAACon Auto Transport, Inc. v. State Farm Mut. Auto Ins. Co., 537 F. 2d 648, 653 (2 Cir., 6/9/76). The first Cummins Amendment of 1915 to the Carmack Amendment was intended to restrict carrier-imposed limitations of liability in bills of lading, and Congress added provises governing notice and filing of claims. Id. at 654. Remedial statutes ordinarily are liberally construed to accomplish their purpose.

A bill of lading clause limiting a common carrier's liability is "strictly construed against the parties whom it is claimed to benefit." Such a limitation "must be clearly expressed" Toyomenka, Inc. v. S.S. Tosaharu Maru, 523 F. 2d 518, 521 (2 Cir., 1975). As this Court noted, 523 F. 2d at 520:

> "Moreover, it must be remembered that the effect of this limitation of liability clause is greatly to reduce the liability of the beneficiary of the clause despite that party's negligence as against a shipper whose goods have been lost or damaged through no fault of his own. In short, in applying strict rules of construction, we do so without blinding ourselves to the equities "

Construing an analogous requirement in a bill of lading for written claims, the Supreme Court declared in Georgia, F. & A. Ry. v. Blish Milling Co., 241 U.S. 190, 198 (1916): "It is addressed to a practical exigency and is to be construed in a practical way."

The bill of lading provides in §2(b) (R.A., p. 25):

> "As a condition precedent to recovery, claims must be filed in writing with the receiving or delivering carrier...in case of failure to make delivery, then within nine months after a reasonable time for delivery has elapsed..."

As in Blish, supra, the bill of lading in the present case does not specify by whom the claim must be filed. In Blish, the only "writing" sent by the shipper to the railroad was a telegram saying: "We will make claim against railroad for entire contents of car at invoice price. Must refuse shipment as we can not handle." 241 U.S. at 193. The identification of the shipment and the description of the damage was contained only in telegrams from the carrier to the shipper. Id. Despite this, and despite the shipper's specification of an incorrect measure of damages, the Court held the "claim" was adequate since "no prejudice resulted." 241 U.S. at 198.

In this Circuit, a district court held that a claim filed with the carrier by "a bailee or agent" of the shipper sufficiently complied with §2(b) of the bill of lading although it specified

neither an amount nor a measure of damages. Delaware, L. & W. R. Co. v. United States, 123 F. Supp. 579 (S.D.N.Y., 1954). Common carriers are bailees of shipments tendered to them. Chesapeake & Ohio Ry. Co. v. Thompson Mfg. Co., 270 U.S. 416, 422-423 (1926). And in the Tenth Circuit correspondence entirely from the carrier to the shipper acknowledging the cause of damage and that the shipper would file a claim when the amount had been ascertained was held to be a sufficient "claim" in the absence of any writing from the shipper within the nine month period. Loveless v. Universal Carloading & Distributing Co., 225 F. 2d 637, 641 (10 Cir., 1955).

Precisely on point here is the decision of the Seventh Circuit in Hopper Paper Co. v. Baltimore & Ohio R.R. Co., 178 F. 2d 179 (7 Cir., 1949), cert. denied, 339 U.S. 943 (1950). Hopper allowed a shipper to recover on a shipment of paper totally destroyed[1/] in a railroad derailment. The railroad had notified the shipper by telegraph and salvaged the goods for $100. No accounting was made to the shipper for the salvage; and no claim was filed by the shipper within the time permitted by the bill of

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1/ By "destroyed" we mean such damage as makes the goods worthless for their intended purpose and having value only as salvage, so that the consignee would be justified in rejecting the entire shipment. See Fraser-Smith Co. v. Chicago, R.I. & P.R. Co., 435 F. 2d 1396, 1399 (8 Cir., 1971)

lading. In the present action Associated's truck was involved in an accident which destroyed American Greetings' shipments. Westransco gave notice to American Greetings and the consignees of the accident by mail, and the carrier disposed of the goods without consulting shipper or consignees and without accounting for any salvage. Westransco and Associated claim there was no salvage of American Greetings' shipments. As discussed infra (pp. 25-26), this does not distinguish the present case from Hopper.

In Hopper, as here, the carrier knew it had destroyed the shipment, notified the shipper in writing and had at least as much if not more knowledge about the damage as did the shipper. The Seventh Circuit, relying on Blish, supra, concluded, 178 F. 2d at 182:

> "In the instant case it is undisputed that defendant and its agents were fully aware and cognizant of the existence of all of the facts concerning the wreck and destruction of the carload of paper. In such a situation a formal notice by plaintiff to the defendant could not have accomplished anything more. Hence, we conclude that the carrier may not use the provisions of the bill of lading to shield itself from the liability imposed upon it by the statute and the common law for its negligent destruction of the shipper's property. To hold otherwise would not be construing the bill of lading 'in a practical way.'"

Judge Fullam ruled in Re Penn Central Transportation Co. and Excel Packing Co., 351 F. Supp. 1348, 1350 (E.D., Pa., 1972) that: "...a carrier owes a quasi-fiduciary duty to the shipper, and is required promptly to alert the shipper to the non-delivera-

bility of the goods, and to minimize the harm."[1/] Westransco complied with this duty by sending the April 19, 1974 letters to the consignees and to American Greetings. If, however, we speculate from the fact that American Greetings has no record of receiving this letter that it never was sent, the result remains unaltered. In Farah Mfg. Co., Inc. v. Continental Airlines, Inc., 524 S.W. 2d 815, 817 (Tex. Ct. Civ. App., 1975) the court quoted Excel Packing, supra, and concluded:

> "Since Appellees breached their duty to promptly alert the Appellant that the shipment could not be delivered--was lost, they are in no position to claim the defense that Appellant did not file its claim in the time allowed....[B]ut for their failure to notify the shipper of the theft of the shipment, the shipper could have timely filed its claim--complied with the tariff."

Accord: Terminal Transport Co., Inc. v. Burger Chef Systems, Inc., 133 Ga. App. 608, 211 S.E. 2d 788, 792 (1974); and South Carolina Steel Corp. v. Southern Ry. Co., 262 S.C. 543, 206 S.E. 2d 828 (1974). Hopper, supra, is cited and relied upon in Farah, in Terminal Transport and in South Carolina Steel Corp.

Westransco's April 19, 1974 letter alone substantially complies with the bill of lading requirement. It was signed by the carrier's claim agent, identifies the shipments and describes the damage. It encloses shipping documents "to assist you in filing claim." A copy of the letter was retained in the carrier's

1/ For examples of this duty at common law, see 2 Hutchinson on Carriers, (3d ed. 1906) §721--notice to shipper after consignee refuses delivery; §743--notice to consignor or owner after seizure under authority of law; and §755--notice when goods detained by customs officials.

files. Blish, supra, 241 U.S. at 195-196, explained the purpose of the bill of lading clause.

> "In fact, the transactions of a railroad company are multitudinous and are carried on through numerous employees of various grades. Ordinarily the managing officers, and those responsible for the settlement and contest of claims, would be without actual knowledge of the facts of a particular transaction. The purpose of the stipulation is not to escape liability but to facilitate prompt investigation." (Emphasis added.)

In South Carolina Steel Corp. v. Southern Ry. Co., supra, a damage report sent by the delivering carrier to the originating railroad was deemed sufficient compliance with the clause, 206 S.E. 2d at 831:

> "The primary purpose or objective of the requirement for a timely written claim being to give the carrier full opportunity to investigate, such purpose is substantially served when the carrier receives a prompt written report as to the damage and its probable cause. At no time within the nine month period could the plaintiff-shipper have furnished the carrier any more information than it already had in writing even if it had proceeded to timely file a formal written claim."

This case is on point because under §413 of the Interstate Commerce Act a freight forwarder like Westransco is deemed to be both the originating and delivering carrier. 49 U.S.C. §1013.

If this Court construes the bill of lading clause "in a practical way," Blish, supra, 241 U.S. at 198, and "without blinding

ourselves to the equities," Toyomenka, supra, 523 F. 2d at 520, it will find that a written claim has been "filed in writing with the receiving or delivering carrier" as required by §2(b) of the bill of lading. The carrier itself, as in Blish, 241 U.S. at 193 and Loveless, supra, 225 F. 2d 637, and the shipper's "bailee or agent" as in Delaware, L & W. R. Co., supra, 123 F. Supp. at 582, fulfilled this requirement. Alternatively, Westransco can be held estopped from insisting on the filing of a written claim since it sent a letter to the shipper with all the information the shipper could have provided in a formal claim. South Carolina Steel Corp., supra. A carrier may not use the bill of lading's terms to shield itself from liability for its own negligent destruction of the shipper's property. Hopper, supra, 178 F. 2d at 1c. Toyomenka, supra, loc. cit.

II Estoppel will not create unjust discrimination.

The court below found strict adherence to the claim filing requirement necessary to prevent unlawful discrimination, citing Chesapeake & Ohio Ry. v. Martin, 283 U.S. 209 (1931). Section 404(b) of the Interstate Commerce Act, 49 U.S.C. §1004(b), provides:

> "It shall be unlawful for any freight forwarder...to subject any particular person, port district, gateway, transit point, locality, region, district, territory, or description of traffic to any unjust discrimination..."

Chesapeake & Ohio Ry. v. Martin did find that estoppel could create an unjust discrimination, but the circumstances there were nothing like the present case. Indeed, had the circumstances been similar the shipper would plainly have recovered; for the bill of lading in Martin explicitly provided that if the goods were "damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery." 283 U.S. at 212. See Chesapeake & Ohio Ry. Co. v. Thompson Mfg. Co., supra, 270 U.S. at 422. Martin, citing Blish, supra, simply ruled that a carrier's technical "conversion" of a shipment by misdelivery cannot be the grounds for estoppel against the claim filing requirement. 283 U.S. at 221-222. Martin expressly left open the issue now presented: "Whether under any circumstances the shipper may rely upon that doctrine [estoppel] in avoidance of the time limitation clause of the bill of lading, we need not now determine." 283 U.S. at 222.

The correct rule to be derived from Blish and Martin, supra, was stated in South Carolina Steel Corp., supra, 206 S. E. 2d at 830:

> "...[A] shipper may not invoke the doctrine of estoppel, to avoid the time limitation for filing claim, predicated upon the conduct of the carrier which gave rise to liability in the first instance."

In that case, as here, the carrier's conduct after the termination or frustration of the transportation contract gave rise

to an estoppel. South Carolina Steel Corp. in reaching this interpretation quoted extensively from the opinion of this Court in Lehigh Valley R.R. Co. v. State of Russia, 21 F. 2d 396, 404 (2 Cir., 1927) cert. denied, 275 U.S. 571 (1927). There a carrier instructed a shipper to file his claim at Philadelphia for destruction of a shipment of explosives, and the shipper did so although the bill of lading required the claim be filed at origin or at destination. This Court found the carrier estopped by its conduct from insisting on literal compliance with the bill of lading when the shipper reasonably relied upon carrier advice.

Although estoppel may create a discrimination among shippers, the decision of this Court in Lehigh Valley is nonetheless correct. As the Supreme Court said in Texas & Pacific Ry. Co. v. Interstate Commerce Commission, 162 U.S. 197, 219 (1896):

> "The very terms of the statute, that charges must be reasonable, that discrimination must not be unjust, and that preference or advantage to any particular person, firm, corporation or locality must not be undue or unreasonable, necessarily imply that strict uniformity is not to be enforced; but that all circumstances and conditions which reasonable men would regard as affecting the welfare of the carrying companies, and of the producers, shippers and consumers, should be considered by a tribunal appointed to carry into effect and enforce the provisions of the act."

Accord: L. T. Barringer & Co. v. United States, 319 U.S. 1, 6 (1943). Whether a discrimination is unjust is ordinarily left to the Interstate Commerce Commission for decision; and the determina-

tion is made, as a matter of fact, on the circumstances of each case. Nashville, C. & St. L. Ry. Co. v. Tennessee, 262 U.S. 318, 322 (1923). In making its determination, the Commission will consider whether the rates or practices "...are designed to create favoritism among shippers of like traffic, or that they are in fact creating or are likely to create favoritism." Coal to New York Harbor, 311 I.C.C. 355, 369 (No. 32871, 1960).

The rule enunciated by the court below (R.A., p. 89) of "strict adherence to the terms of a bill of lading issued pursuant to the Interstate Commerce Act" will lead to many strange and disastrous results if applied as broadly and uncritically as was done in the present case. For example, where a carrier takes the cargo for its own use and benefit (a so-called "true conversion"), a stipulation in the bill of lading limiting liability to a given amount will not be enforced.1/ As stated in Van Dyke vs. Pennsylvania R.R. Co., 46 Del. 529, 540, 86 A. 2d 346, 351 (Del. Sup'r Ct., 1952):

1/ Section 2(a) of the uniform bill of lading provides in part (R.A., p. 59): "In all cases not prohibited by law, where a lower value than actual value has been represented in writing by the shipper or has been agreed upon in writing as the released value of the property as determined by the classification or tariffs upon which the rate is based, such lower value plus freight charges if paid shall be the maximum amount to be recovered, whether or not such loss or damage occurs from negligence." Pursuant to the first Cummins Amendment of 1915 to the Carmack Amendment, this limitation of liability is "prohibited by law" only absent express authorization or requirement of the I.C.C. of rates dependent upon the value declared in writing. 49 U.S.C. §20(11). AAACon Auto Transport Inc. v. State Farm Mut. Auto. Ins. Co., supra, 537 F. 2d at 654.

> "Notwithstanding the general rule that a stipulation restricting the carrier's liability found in a contract of carriage is applicable in practically all situations involving loss or damage to goods, yet, the carrier can never invoke protection of the stipulation in the event of a true conversion by the carrier itself, as in such instances uniformity prevails in the settled conclusion that a carrier by reason of an appropriation of the goods for its use and gain has forfeited its right and protection under such a stipulation and is, therefore, liable to the shipper for the actual value of the goods so converted. Dexter & Carpenter v. Davis (4 Cir.), 281 F. 385; Henderson v. Wells Fargo & Co., 217 S.W. 962; Ry. Exp. Agency v. Marchant Calculating Machine Co., supra [52 A. 2d 277]; Norfolk & Western Railroad Co. v. Nottingham & Wren, 139 Va., 748, 124 S.E. 398; Am. Ry. Exp. Co. v. Levee, 263 U.S. 19, 44 S. Ct. 11, 68 L. Ed. 140; Moore v. Duncan, supra. [237 Fed. 780, 150 C.C.A. 534 (6 Cir., 1916)]."

No discrimination results from failure to enforce the released value limitations in the bill of lading when the carrier converts the cargo to its own use and benefit. Discrimination would rather result if the carrier were permitted to deliver the freight of shippers it favored and to buy the goods of unfavored shippers at the low released valuation.

Carriers have also been held estopped from collecting their freight charges from the consignee on shipments marked "prepaid" when the carrier's delay in billing the charges prevented it from collecting from an insolvent consignor. Ordinarily, both consignor and consignee are liable to the carrier for freight charges on a prepaid shipment pursuant to section 7 of the terms of the uniform bill of lading. Illinois Steel Co. v. Baltimore & Ohio R.R. Co., 320 U.S. 508 (1944). Nevertheless, Missouri Pacific

R.R. Co. v. National Milling Co., 409 F. 2d 882, 883 (3 Cir., 1969) found that a carrier by affirmatively stating that the shipment was prepaid:

> "...in effect directed the consignee to reimburse the shipper for the freight the latter had prepaid. As a result, the consignee in paying its bill to the consignor included the freight charges solely because the carrier had formally notified it that these had been prepaid by the consignor."

Southern Pacific Transportation Co. v. Campbell Soup Co., 455 F. 2d 1219, 1222 (8 Cir., 1972) held that where a railroad erroneously marked the bill of lading prepaid and the consignor became insolvent prior to collection of freight charges:

> "...a consignee of goods who has paid the amount of the freight charges to the consignor may raise the defense of estoppel against a carrier's claim for freight charges. This rule will not erode the purpose of Section 6(7) as long as the ground for estoppel did not serve directly or indirectly as a cover for freight rate discrimination."

The rule is the same in other Circuits. United States v. Mason & Dixon Line, 222 F. 2d 646 (6 Cir., 1955). Consolidated Freightways Corp. of Delaware v. Admiral Corp., 422 F. 2d 56 (7 Cir., 1971). In this Circuit the same result was reached on similar facts by somewhat different reasoning. Farrell Lines, Inc. v. Titan Industrial Corp., 306 F. Supp. 1348 (S.D. N.Y., 1969), affirmed per curiam, 419 F. 2d 835 (2 Cir., 1969), cert. denied, 397 U.S. 1042 (1970).

This doctrine was most recently applied in Aero Mayflower Transit Co. v. Hofberger, 532 S.W. 2d 759, 761 (Ark., 2/23/76). There, the Arkansas Supreme Court sharply distinguished estoppel as to the amount of freight charges due from estoppel as to the liability of the consignee. A carrier must collect the full legal tariff charge even where the carrier contracted for or mistakenly billed a lower rate. Yet if no undercharge is involved, the carrier may be estopped where the consignee had a specific contract that he was not liable and also where the carrier's conduct led the consignee to reimburse the consignor for freight charges the carrier indicated had been prepaid.

In the foregoing situations, application of the doctrine of estoppel produces different treatment of shippers, but the resulting "discrimination" is just and proper, and not unlawful. Similarly, in the present action the problem of unjust discrimination can be disposed of with "but a few words" as it was by the Seventh Circuit in Hopper, supra, 178 F. 2d at 182.

> "Concededly, one of the principal evils at which the Act was aimed was discrimination by carriers. State of New York v. United States, 331 U.S. 284, 296, 67 S. Ct. 1207, 91 L. Ed. 1492. But permitting knowledge to supply the written notice is not discrimination, nor is it a preference in favor of a particular shipper at the expense of the other. It is a mode of proof, applicable alike to all railroads and in favor of all shippers. Baldwin v. Atlantic Coast Line R. Co., 170 N.C. 12, 86 S.E. 776; Schloss-Bear-Davis Co. v. Louisville & N. R. Co., 171 N.C. 350, 88 S.E. 476; The Argentino, D.C., 28 F. Supp. 440. We cannot agree that where a carrier has full knowledge of a loss caused by its

> admitted negligence and a written record thereof in its files, the allowance of a recovery for the admitted value of the loss could be construed as discrimination in favor of the shipper or against the carrier. Obviously, the same rule would uniformly apply under similar facts to all other shippers and carriers."

As a practical matter, adequate remedies exist if a carrier deliberately notifies favored shippers in writing of the destruction of their shipments and notifies other shippers orally or not at all as a device to excuse some shippers but not all from filing written claims. These include complaint to the Commission or investigation on its own motion and suit by the Commission or other parties for an injunction. 49 U.S.C. §§1006(a&b), 1017(b) and 1021(a). Fines and imprisonment may be imposed on carriers practicing deliberate discrimination, on shippers or consignees knowingly accepting the benefit of it and on the wrongdoing employees of each. 49 U.S.C. §§41(1) and 1021(g).

In addition, the Commission can and does prescribe rules for carrier processing of loss and damage claims. Rules, Regulations and Practices of Regulated Carriers With Respect to the Processing of Loss and Damage Claims, 340 I.C.C. 515, 539-546 (Ex Parte 263, 1972). These rules may be amended if necessary to prevent such abuses. The strong policy of the Interstate Commerce Act against unjust discrimination does not require that a shipper be precluded from recovery for his goods where the carrier had full knowledge of all the damage and has acknowledged in writing to the shipper its awareness of the circumstances.

III Substantial compliance with claim requirements and estoppel in the present case are consistent with other decisions.

Cases cited by the court below (R.A., p. 89) have required more formal claims in circumstances other th .1 those presented here. All these decisions have accepted Blish, supra, as the guide to interpretation of the bill of lading clause. None of the cases, whether relying on Hopper and Loveless, supra, or distinguishing them, has attempted to reconcile the developing doctrine. Compare South Carolina Steel Corp., supra, 206 S.E. 2d at 832 with Northern Pacific R.R. v. Mackie, 195 F. 2d 641, 643 (9 Cir., 1952). This Court, we suggest, should adopt an interpretation that harmonizes the decisions in the various Circuits.

The claim filing clause is valid and applicable to any damage or failure to deliver interstate shipments. Blish, supra. 241 U.S. at 196. The claim requirement may be satisfied by substantial compliance, Ibid. at 198, or the carrier's conduct subsequent to the loss may estop it from invoking the clause, Lehigh Valley R.R. Co., supra, 21 F. 2d at 404, as long as the carrier is not prejudiced in the conduct of its investigation, Blish, supra, 241 U.S. at 198. Substantial compliance and estoppel are not mutually exclusive categories; rather they tend to shade into one another.

Where goods are undeliverable, the carrier must notify the shipper, Excel Packing, supra, 351 F. Supp. at 1350. If, pursuant to this duty, the carrier gives notice in a writing which identifies the shipment and describes the destruction of the

shipment, it has "filed" a claim in writing with itself on behalf of the shipper. A claim may be filed by the shipper or consignee or by one acting lawfully on their behalf. The document need not state that it is a claim where from the circumstances the carrier should know it will be held liable.

The Sixth Circuit in Delphi Frosted Foods Corp. v. Illinois Central R. Co., 188 F. 2d 343, 345 (6 Cir., 1951) cert. denied, 342 U.S. 833 (1951) said somewhat loosely:

> "While the purpose of the notice is to give the carrier an opportunity to investigate the claim, the identity of the claimant is a material feature of any such investigation. As stated in Appalachian Electric Power Co. v. Virginian Ry. Co., 126 W. Va. 616, 29 S.E. 2d 471, the bill of lading clearly contemplates that the person damaged shall file the claim."

In Delphi the shipper attempted to rely on claims filed by "customers who had contracted to purchase portions of the shipment..." and who had successfully compelled the shipper to refund the amounts they had paid since title had not passed to them at the time of damage. Id. The opinion of the district court shows, 89 F. Supp. 55, 56 (W.D. Ky., 1950), that the plaintiff was named on the bill of lading for all but one shipment as both consignor and consignee; and while the remaining shipment was consigned to "Southland Products Co." neither district court nor court of appeals indicated that Southland Products filed any claim. Thus, the putative claims were filed by strangers to the transporta-

tion contract who neither had nor were acting on behalf of anyone with an interest in the goods. Similarly, the Appalachian Electric Power Co. case cited by Delphi rejected as insufficient a notation on a delivery receipt and a damage report to the carrier both made by the carrier's agent who was acting neither for nor at the request of the consignee.

The notion that only a person actually damaged can file a claim was implicitly rejected by Loveless, supra, where all the writings were made by the carrier, and explicitly by the Alaska Supreme Court in Kvasnikoff v. Weaver Bros., Inc., 405 P. 2d 781, 783-784 (Alaska, 1965) which said:

> "Nor is the claim deficient because not made by appellant, the consignee of the shipment. There is authority to the contrary [citing Delphi]. But we subscribe to the view that the notice of claim provision in the bill of lading is satisfied if the carrier is given authoritative notice in writing that the consignee intends to claim damages, even though none of the writings constituting such notice are made by the consignee. The notice given here was authoritative because Washington Fish & Oyster Company had a legitimate interest in the shipment."

Indeed, while §2(b) of the bill of lading specifies that suits must be brought against carriers within two years and one day after the claim is declined in writing "by the carrier," it does not prescribe by whom "claims must be filed...".

While several decisions have required that the claim document indicate an intention to hold the carrier liable, that

intention can be inferred from the circumstances of the loss. Thus while Insurance Co. of North America v. Newtowne Mfg. Co., 187 F. 2d 675, 680-681 (1 Cir., 1951) called for documents "indicating an intention on the shipper's part to claim reimbursement from the carrier," the documents there were deemed inadequate because "they did not show on their face the happening of any loss which might be the subject of a claim." Citing Newtowne, the Sixth Circuit also stated as a necessary element of a claim that the document "indicates an intention to claim damages." American Synthetic Rubber Corp. v. Louisville & N. R. Co., 422 F. 2d 462, 468 (6 Cir., 1970). Nevertheless it found sufficient compliance in documents which (422 F. 2d at 468-469):

> "...although not expressly reciting a claim for damages, clearly reveal the particular shipment to which the claim refers, the railroad error in routing that shipment, and the source of damages. When these documents are viewed in the context of the surrounding circumstances, they constitute an adequate statement of claim within the requirements of section 2(b)." (Emphasis added.)

Accord: Delaware, L. & W. R. Co. v. United States, supra, 123 F. Supp. at 582; and Hopper, supra. Both the Newtowne and the American Synthetic Rubber tests are met by a notice from the carrier of nondeliverability.

Where a shipment is totally destroyed and the cause of damage is evident, the carrier is chargeable with notice (and here actually knew, R.A., p. 54) that it will be held liable for the

value of the cargo at the time and place it should have been delivered. This is the measure of damages prescribed in Chicago, M. & St. P. Ry. Co. v. McCaull-Dinsmore Co., 253 U.S. 97 (1920), and the statement by the claimant of any other measure would be irrelevant, Blish, supra, 241 U.S. at 198.

In contrast to situations where partially damaged goods are accepted by a consignor for salvage or repair, if the goods are totally destroyed and the carrier performs the salvage, it knows better than either shipper or consignee that it ought to be held liable. In Blish, supra, the shipper's representative consulted with the carrier about salvage. 241 U.S. at 193. Also, the shipment was only partially damaged and the consignee should have accepted the goods and filed claim. Fraser-Smith Co., supra. Therefore the final telegram indicating an intention to file claim was necessary. In Hopper, supra, and in the present case, the destruction of the shipment was complete and the carrier performed salvage without consulting shipper or consignee. The carrier's duty to notify and act on behalf of the shipper and the carrier's superior knowledge both arose from the fact of complete destruction and nondeliverability.

Nondeliverability and the carrier's consequent duty to notify the shipper and minimize the damages distinguish this case and Hopper from such cases as East Texas Motor Freight Lines v. United States, 239 F. 2d 417 (5 Cir., 1956) and Atlantic Coast Line R. Co. v. Pioneer Products, 256 F. 2d 431 (5 Cir., 1958). In

both of the latter cases the consignee accepted damaged goods and repaired or salvaged them. The Fifth Circuit emphasized the importance of this circumstance in East Texas to distinguish Hopper, saying, 239 F. 2d at 420-421: "We do not have that situation here. The machinery was not destroyed or taken over by appellant...". The carrier was therefore under no duty to notify anyone. A report of a damage inspection by the carrier's agent could not be considered a claim since it was made on behalf of the carrier, to protect its interest, rather than pursuant to a duty to the shipper.

Likewise, carrier inspection reports did not constitute claims in Northern Pacific R. Co. v. Mackie, 195 F. 2d 641 (9 Cir., 1952) where damaged lumber was refused by the consignee and disposed of by the shipper at a loss; nor in B. A. Walterman & Co. v. Pennsylvania R. Co., 295 F. 2d 627 (6 Cir., 1961) where partly damaged goods were accepted by the consignee and returned free to the shipper for repair. There being no complete loss resulting in nondeliverability, the carrier was not obliged to act on behalf of the shipper and the inspection reports were not made on his behalf.

Estoppel based on carrier conduct subsequent to the loss may prevent it from asserting a defense based on the claim requirement. In the previously cited cases, a carrier's inspection report was held not to constitute a claim. However, if the carrier instructs the shipper not to file a claim and the shipper follows that advice, an inspection report alone will be sufficient

compliance and the carrier will be estopped. South Carolina Steel Corp., supra, 206 S.E. 2d at 831. This case contrasts particularly with Mackie, supra, where the carrier's inspection report correctly advised the shipper of the claim requirements of section 2(b). In Mackie, the shipper was not misled by the carrier and the carrier was not estopped from asserting the written claim requirement.

Whether a carrier can ever be estopped to assert the defense of failure to comply with the claim filing requirement in the absence of a writing between the parties is a troublesome question. Oral claims by a shipper do not satisfy the claim provision. B. A. Walterman, supra; Newtowne, supra. In most of the estoppel cases there was some kind of writing: a telegram from the carrier in Hopper; a letter from the carrier in Loveless; a claim filed by the shipper at the wrong place in Lehigh Valley; and a carrier inspection report in South Carolina Steel Corp. However, in Farah Mfg. Co., supra, the court found the carrier estopped absent any writing because of its failure to notify the shipper of the theft of the shipment.

Perhaps Farah can be distinguished since the carriers there were not subject to the Interstate Commerce Act; but this does not solve the problem because the duty to notify was derived from Excel Packing which did involve such a carrier. The claims in Hopper and in the present case are valid since the carrier's writings were made by virtue of a duty to the shipper. Is the

shipper to be placed in a worse position when the carrier not only fails to make delivery but also breaches its duty to notify? We think not. Just as a carrier will be estopped in cases of "true conversion" from claiming a limitation of its liability, so too its wrongful failure to notify the shipper and consignee must bar the claim requirement. Farah correctly states the rule, 424 S.W. 2d at 817:

> "Thus, where a carrier by its own act makes it impossible for a shipper to give notice within the time limited by the contract, the failure to give notice is held not to bar a recovery."

The basis of this rule is carrier wrongdoing independent of its original failure to deliver. Therefore, the general prohibition against oral claims will remain. If the carrier duly gives oral notice, the shipper will be in no better position than if it had filed an oral claim itself.

Although isolated language in Hopper may seem to say that actual knowledge by the carrier of the loss is by itself sufficient to excuse a shipper's failure to file written claim, as a whole the case shows that the telegram sent by the carrier there on behalf of the shipper substantially complied with this requirement. The court below distinguished Hopper (R.A., p. 89), after rejecting it (R.A., p. 88), on the grounds that in Hopper the carrier retained the proceeds of sa[illegible] whereas in the present case there was no salvage. The court ignored the factual discrepancy between the answers to interrogatories of Westransco that the shipments

became "almost impossible to identify" after the accident (R.A., p. 46) and those of Associated that it retained $1,500 of salvage proceeds but none came from American Greetings' shipments.

In any event the distinction of the court below is unfounded. Hopper could have forced the carrier to disgorge only the salvage proceeds by treating the case as one of "true conversion" of the shipper's damaged property, and exempting the proceeds from claim requirements just as they would be exempt from released value limitations in the bill of lading. Instead of this treatment, the Seventh Circuit allowed full recovery of the entire value of the shipment. Confirming the unimportance of salvage, a district court bound by Hopper applied it without any mention of salvage proceeds. Stearns-Roger Corp. v. Norfolk & W. Ry. Co., 356 F. Supp. 1238 (N.D. Ill., 1973). Retention of salvage proceeds was not crucial; what really mattered was the carrier's greater knowledge of the circumstances of the loss than either shipper or consignee possessed.

This Court therefore should hold that, under the precedents as harmonized, American Greetings substantially complied with the claim requirement when Westransco "filed" the April 19, 1974 letter (R.A., p. 54) "with" itself on behalf of American Greetings.

IV American Greetings' prima facie case on the merits is unrebutted.

No facts constituting American Greetings' prima facie case were questioned either by Westransco or Associated in the record below. A shipper's prima facie case has been defined by the Supreme Court in Missouri Pacific R.R. Co. v. Elmore & Stahl, 377 U.S. 134, 138 (1964):

> "Accordingly, under federal law, in an action to recover from a carrier for damage to a shipment, the shipper establishes his prima facie case when he shows delivery [to the carrier] in good condition, arrival in damaged condition, and the amount of damages. Thereupon, the burden of proof is upon the carrier to show both that it was free of negligence and that the damage to the cargo was due to one of the excepted causes relieving the carrier of liability."

Delivery to Westransco of the shipments in good condition is evidenced in the record by the five bills of lading issued by Westransco (R.A., pp. 27-31, 49-53) which contain the provisions of the uniform bill of lading acknowledging that the carrier has:

> "Received, subject to the classifications and tariffs in effect on the date of the issue of this bill of lading, the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown)..." (R.A., p. 83).

This recitation is prima facie evidence that the goods were delivered to the carrier in the quantity and quality described and that the goods were in apparent good order so far as could be determined from external inspection. Tuschman v. Pennsylvania R.R.

Co., 230 F. 2d 787, 791 (3 Cir., 1956). When a consignment is received by a common carrier in external good order and delivered by it with the external covering of the goods so damaged as to account for the damage to the contents, the owner need not prove the internal good order of the goods at the time of receipt by the carrier, and the presumptive liability of the carrier is established. Reider v. Thompson, 197 F. 2d 158, 161 (5 Cir., 1952); see also 116 F. Supp. 279 (E.D. La., 1953). Where the cause of the loss is evident, as here, there is a rebuttable presumption that the cargo was in good condition when tendered to the carrier. Time-D.C. Inc. v. S. W. Historical Wax Museum, 528 S.W. 2d 901, 903 (Tex. Ct. Civ. App., 1975).

Where goods are tendered to a carrier and never delivered, the liability of the carrier is established and only the amount of damages remains to be determined. As shown by Kingsley Sportswear, Inc. v. Standard Hauling Co., Inc., 49 A.D. 2d 854, 855, 374 N.Y.S. 2d 19, 20 (1st Dept., 1975), the carrier is liable for the value of whatever was tendered to it for shipment; and the condition of the goods at origin only relates to the amount of damages. If the shipper tendered damaged goods to the carrier, the carrier must deliver the goods to the consignee in the same condition. Here no delivery was made, and at the least American Greetings is entitled to an interlocutory summary judgment on the issue of liability alone pursuant to Rule 56(c) of the Federal Rules of Civil Procedure.

The final element of American Greetings' prima facie case, the amount of damages, is fulfilled in the affidavit of Mr. James Edler. (R.A., pp. 58-59). There he shows that the full actual loss to the three shipments of greeting cards was $4,426.55, $2,733.70 and $2,478.20; and the combined released value for the two shipments of earthenware was $570.43. The total of these sums is $10,208.88, the amount sought in this action.

Missouri Pacific v. Elmore & Stahl, supra, lists five affirmative defenses to a carrier's absolute liability and the same defenses are set forth in the bill of lading. However, Westransco pleaded none of these defenses in this action. If this Court deems the requirement in the bill of lading for filing of written claim was fulfilled by the letter of April 19, 1974, then American Greetings is clearly entitled to recover the full amount sought. The third-party complaint between Westransco and Associated, which the court below dismissed as moot, should be remanded for further proceedings.

CONCLUSION

For the foregoing reasons, the decision below should be reversed with directions to enter judgment for American Greetings against Westransco in the amount of $10,208.88 with interest and costs, and to reopen the third-party complaint for further proceedings consistent with the decision of this Court.

Respectfully submitted,

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Dated: October 14, 1976

CERTIFICATE OF SERVICE

I hereby certify that I have this day served two copies of the foregoing brief and one copy of the record appendix in this action upon all parties of record by first class mail, postage prepaid, at the addresses designated by them ~~or~~ by personal delivery

Done in the City, County and State of New York this day of October, 1976.

Martin S. Snitow

STATUTES AND RULES CONSIDERED

The Carmack Amendment to the Interstate Commerce Act, as amended, 49 U.S.C. §20(11) Provides:

> (11) That any common carrier, railroad, or transportation company subject to the provisions of this part receiving property for transportation from a point in one State or Territory or the District of Columbia to a point in another State, Territory, District of Columbia, or from any point in the United States to a point in an adjacent foreign country shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, and no contract, receipt, rule, regulation, or other limitation of any character whatsoever shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed; and any such common carrier, railroad, or transportation company so receiving property for transportation from a point in one State, Territory, or the District of Columbia to a point in another State or Territory, or from a point in a State or Territory to a point in the District of Columbia, or from any point in the United States to a point in an adjacent foreign country, or for transportation wholly within a Territory, or any common carrier, railroad, or transportation company delivering said property so received and transported shall be liable to the lawful holder of said receipt or bill of lading or to any party entitled to recover thereon, whether such receipt or bill of lading has been issued or not, for the full actual loss, damage, or injury to such property caused by it or by any such common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made is hereby declared to be unlawful

Carmack Amendment to the Interstate Commerce Act, as amended, continued:

and void: *Provided*, That if the loss, damage, or injury occurs while the property is in the custody of a carrier by water the liability of such carrier shall be determined by the bill of lading of the carrier by water and by and under the laws and regulations applicable to transportation by water, and the liability of the initial or delivering carrier shall be the same as that of such carrier by water: *Provided, however*, That the provisions hereof respecting liability for full actual loss, damage, or injury notwithstanding any limitation of liability or recovery or representation or agreement or release as to value, and declaring any such limitation to be unlawful and void, shall not apply, first, to baggage carried on passenger trains or boats, or trains or boats carrying passengers; second, to property, except ordinary livestock, received for transportation concerning which the carrier shall have been or shall hereafter be expressly authorized or required by order of the Interstate Commerce Commission to establish and maintain rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property, in which case such declaration or agreement shall have no other effect than to limit liability and recovery to an amount not exceeding the value so declared or released, and shall not, so far as relates to values, be held to be a violation of section 10 of this part to regulate commerce, as amended; and any tariff schedule which may be filed with the Commission pursuant to such order shall contain specific reference thereto and may establish rates varying with the value so declared and agreed upon; and the Commission is hereby empowered to make such order in cases where rates dependent upon and varying with declared or agreed values would, in its opinion, be just and reasonable under the circumstances and conditions surrounding the transportation. The term "ordinary livestock" shall include all cattle, swine, sheep, goats, horses, and mules, except such as are chiefly valuable for breeding, racing, show purposes, or other special uses: *Provided further*, That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under the existing law: *Provided further*, That all actions brought under and by virtue of this paragraph against the delivering carrier shall be brought, and may be maintained, if in a district court of the United States, only in a district, and if in a State court, only in a State through or into which the defendant carrier operates a line of railroad: *Provided further*, That it shall be unlawful for any such receiving or delivering common carrier to provide by

Carmack Amendment to the Interstate Commerce Act, as amended, concluded:

> rule, contract, regulation, or otherwise a shorter period for the filing of claims than nine months, and for the institution of suits than two years, such period for institution of suits to be computed from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice: *And provided further*, That for the purposes of this paragraph and of paragraph (12) the delivering carrier shall be construed to be the carrier performing the line-haul service nearest to the point of destination and not a carrier performing merely a switching service at the point of destination: *And provided further*, That the liability imposed by this paragraph shall also apply in the case of property reconsigned or diverted in accordance with the applicable tariffs filed as in this part provided.

Section 404(b) of the Interstate Commerce Act, 49 U.S.C. §1004(b), provides:

> (b) It shall be unlawful for any freight forwarder, in service subject to this part, to make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, port district, gateway, transit point, locality, region, district, territory, or description of traffic in any respect whatsoever, or to subject any particular person, port, port district, gateway, transit point, locality, region, district, territory, or description of traffic to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided*, That this subsection shall not be construed to apply to discriminations, prejudice, or disadvantage to the traffic of any carrier of whatever description.

Section 406(a & b) of the Interstate Commerce Act, 49 U.S.C. §1006(a & b), provides:

> SEC. 406. [*May 16, 1942.*] [*49 U. S. C. § 1006.*] (a) Any person may make complaint in writing to the Commission that anything done or omitted to be done by any freight forwarder is or will be in violation of this part. Every complaint shall state fully the facts complained of and the reasons for such complaint. If such freight forwarder shall not satisfy the complaint within a time specified by the Commission, or there shall be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.
>
> (b) Whenever, after hearing, upon complaint or in an investigation on its own initiative, the Commission shall be of opinion that any rate or charge demanded, charged, or collected for service subject to this part, or any classification, regulation, or practice relating thereto, is or will be unjust or unreasonable or unjustly discriminatory, or unduly preferential or prejudicial, or otherwise in violation of any provision of this part, it shall determine and prescribe the lawful rate or charge or the maximum or minimum, or maximum and minimum, rate or charge thereafter to be observed, or the lawful classification, regulation, or practice thereafter to be made effective.

Section 413 of the Interstate Commerce Act, 49 U.S.C. § 1013, provides:

> SEC. 413. [*May 16, 1942.*] [*49 U. S. C. § 1013.*] The provisions of section 20 (11) and (12) of part I of this Act, together with such other provisions of such part (including penalties) as may be necessary for the enforcement of such provisions, shall apply with respect to freight forwarders, in the case of service subject to this part, with like force and effect as in the case of those persons to which such provisions are specifically applicable, and the freight forwarder shall be deemed both the receiving and delivering transportation company for the purposes of such section 20 (11) and (12). When

Section 413 of the Interstate Commerce Act, 49 U.S.C. §1013, continues:

> the services of a common carrier by motor vehicle subject to part II of this Act are utilized by a freight forwarder for the receiving of property from a consignor in service subject to this part, such carrier may, with the consent of the freight forwarder, execute the bill of lading or shipping receipt for the freight forwarder. When the services of a common carrier by motor vehicle subject to part II of this Act are utilized by a freight forwarder for the delivery of property to the consignee named in the freight forwarder's bill of lading, shipping receipt, or freight bill, the property may, with the consent of the freight forwarder, be delivered on the freight bill, and receipted for on the delivery receipt, of the freight forwarder.

Section 417(b) of the Interstate Commerce Act, 49 U.S.C. §1017(b), provides:

> (b) (1) If any freight forwarder fails to comply with or operates in violation of any provision of this part, or any rule, regulation, requirement, or order thereunder, or of any term or condition of any permit, the Commission or the Attorney General of the United States (or, in case of such an order, any party injured by the failure to comply therewith or by the violation thereof) may apply to any district court of the United States having jurisdiction of the parties for the enforcement of such provision of this part or of such rule, regulation, requirement, order, term, or condition; and such court shall have jurisdiction to enforce obedience thereto by writ or writs of injunction or other process, mandatory or otherwise, restraining such freight forwarder and any officer, agent, employee, or representative thereof from further violation of such provision of this part or of such rule, regulation, requirement, order, term, or condition, and enjoining obedience thereto.
>
> (2) If any person operates in clear and patent violation of section 410 of this part, or any rule, regulation, requirement, or order thereunder, any person injured thereby may apply to the district court of the United States for any district where such person so violating operates, for the enforcement of such section, or of such

Section 417(b) of the Interstate Commerce Act, 49 U.S.C.§1017)b), continues:

> ·le, regulation, requirement, or order. The court shall ·ve jurisdiction to enforce obedience thereto by a writ ·f injunction or by other process, mandatory or other·ise, restraining such person, his or its officers, agents, employees, and representatives from further violation ·f such section or of such rule, regulation, requirement, ·r order; and enjoining upon it or them obedience thereto. A copy of any application for relief filed pursuant to ·his paragraph shall be served upon the Commission and a certificate of such service shall appear in such applica·ion. The Commission may appear as of right in any such ·ction. The party who or which prevails in any such ·ction may, in the discretion of the court, recover rea·onable attorney's fees to be fixed by the court, in addi·ion to any costs allowable under the Federal Rules of Civil Procedure, and the plaintiff instituting such action ·hall be required to give security, in such sum as the court ·eems proper, to protect the interests of the party or ·arties against whom any temporary restraining order, ·emporary injunctive or other process is issued should ·t later be proven unwarranted by the facts and circum·tances.
>
> (3) In any action brought under paragraph (2) of this subsection, the Commission may notify the district ·ourt of the United States in which such action is pend·ing that it intends to consider the matter in a proceeding ·efore the Commission. Upon the filing of such a notice the court shall stay further action pending disposition of ·he proceeding before the Commission.

Section 421(a) of the Interstate Commerce Act, 49 U.S.C. §1021 (a) provides:

> SEC. 421. [*May 16, 1942.*] [*49 U. S. C. § 1021.*] (a) Any person who knowingly and willfully violates any provision of this part, or any rule, regulation, requirement, or order thereunder, or any term or condition of any permit, for which no penalty is otherwise provided, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be subject to a fine of not more than $100 for the first offense and not more than $500 for any subsequent offense. Each day of such violation shall constitute a separate offense.

Section 421(g) of the Interstate Commerce Act, 49 U.S.C. §1021(g), provides:

> (g) The provisions of the Elkins Act of February 19, 1903, as amended (U. S. C., 1940 ed., title 49, secs. 41, 42, and 43), shall apply to service subject to this part, and to freight forwarders and shippers in respect to such service, and shall apply for purposes of enforcement of this part; and the provisions of such Act shall be considered to apply in addition to, and not to the exclusion of, the provisions of this part.

Section 1 of the Elkins Act, 49 U.S.C. §41(1), provides:

> SEC. 1. [*February 19, 1903 amended June 29, 1906.*] [*49 U. S. C. § 41 (1).*] That anything done or omitted to be done by a corporation common carrier, subject to the Act to regulate commerce and the Acts amendatory thereof, which, if done or omitted to be done by any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, would constitute a misdemeanor under said Acts or under this Act, shall also be held to be a misdemeanor committed by such corporation, and upon conviction thereof it shall be subject to like penalties as are prescribed in said Acts or by this Act with reference to such persons, except as such penalties are herein changed. The willful failure upon the part of any carrier subject to said Acts to file and publish the tariffs or rates and charges as required by said Acts, or strictly to observe such tariffs until changed according to law, shall be a misdemeanor, and upon conviction thereof the corporation offending shall be subject to a fine of not less than one thousand dollars nor more than twenty thousand dollars for each offense; and it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said Act to regulate commerce and the Acts amendatory thereof whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said Act to regulate commerce and the Acts amendatory thereof, or whereby any other advantage is given or

Section 1 of the Elkins Act, 49 U.S.C. §41(1), continues:

> discrimination is practiced. Every person or corporation, whether carrier or shipper, who shall, knowingly, offer, grant, or give, or solicit, accept, or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than one thousand dollars nor more than twenty thousand dollars: *Provided*, That any person, or any officer or director of any corporation subject to the provisions of this Act, or the Act to regulate commerce and the Acts amendatory thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by any such corporation, who shall be convicted as aforesaid, shall, in addition to the fine herein provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court. Every violation of this section shall be prosecuted in any court of the United States having jurisdiction of crimes within the district in which such violation was committed, or through which the transportation may have been conducted; and whenever the offense is begun in one jurisdiction and completed in another it may be dealt with, inquired of, tried, determined, and punished in either jurisdiction in the same manner as if the offense had been actually and wholly committed therein.

Rule 56(c) of the Federal Rules of Civil Procedure Provides:

> (c) MOTION AND PROCEEDINGS THEREON. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.